IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 561.

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., *Appellees*.

On Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

BRIEF ON BEHALF OF ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., APPELLEES.

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OPINIONS BELOW.

The opinion of the specially constituted District Court of the United States for the Eastern District of North Carolina, Raleigh Division, in No. 189 Civil, *State of North Carolina* v. *United States*, appears in the Record at pages

549-574; its findings of fact and conclusions of law appear at pages 546-547; its decree thereon entered appears at page 545; and reported 56 F. Supp. 606.

The order of the Interstate Commerce Commission which gave rise to the proceedings in the District Court appears at pages 507-508 of the Record; the report of the Commission upon which said order was made appears in the Record at pages 69-96; and is reported 258 I. C. C. 133, entitled *Alabama Intrastate Fares.*[1]

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 47(a) and 345, wherein a direct appeal to this Court is authorized from a final decree of a specially constituted District Court of the United States, made pursuant to the provisions of Title 28, U. S. C., Sections 41 (28), 43-48, and Title 49, U. S. C., Section 17 (19), in a case brought to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission (herein called I. C. C.), other than for the payment of money.

Appellant Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, hereinafter called Price Administrator, filed his motion for leave to intervene as a party plaintiff (R. 37) and in that connection filed what he termed his complaint or petition (R. 38-54) wherein, in addition to seeking the injunctive relief sought by the State of North Carolina and its Utilities Commission, he sought a trial *de novo* in said Court in respect of the allegations of paragraph 16 of his complaint or petition (R. 48-49). His

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[1] The report and subsequent order of the Interstate Commerce Commission embraced four proceedings; one involving passenger fares within the State of North Carolina here immediately involved, Docket 29036, and three other similar and separate proceedings involving passenger fares within each of the States of Alabama, Docket 28963, Tennessee, Docket 29037, and Kentucky, Docket 29000. While there were four separate proceedings, the I. C. C.'s decision was embraced in one report and order.

motion to intervene recited it was filed under authority of Title 28, United States Code, Section 45a (R. 37). This appellant was granted the right to intervene as a plaintiff in this suit (R. 37-38).

The North Carolina rail lines (appellees here), upon whose petition the I. C. C. instituted the proceedings giving rise to the order here involved, duly intervened as parties defendant in the District Court under authority of Title 28, U. S. C., Section 45a (R. 107-109).

The final decree of the District Court was entered on the twentieth day of July, 1944 (R. 545). The petition for appeal was presented and allowed on the eighteenth day of September, 1944 (R. 587). Probable jurisdiction was noted by this Court on the thirteenth day of November, 1944 (R. 596).

THE STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, Part I, as amended; particularly its provisions relating to prescription of reasonable rates (Title 49, U. S. C., Section 15(1)) for the transportation of persons in the light of what is known as the "rule of rate making" (Title 49, U. S. C., Section 15a (2), 54 Stat. 912), and the "national transportation policy" (Title 49, U. S. C., notes preceding Section 1, 54 Stat. 899); and more especially involved is the application of the Federal statute (Title 49, U. S. C., Section 13(3) (4)) to remove any unreasonable preference or prejudice as between persons in intrastate and interstate commerce, or any unreasonable discrimination against interstate commerce. These sections of the Act are set out in Appendix A to our brief in No. 560, *State of North Carolina* v. *United States*, pending in this Court.

Section 13(4) together with extracts from Emergency Price Control Act of 1942 (56 Stat. 23, 36) and from Stabilization Act of 1942 (56 Stat. 765), here immediately involved, are set out in an appendix hereto. We quote therefrom for more convenient reference.

Interstate Commerce Act, Part I, Section 13(4) declares:

> "Whenever . . . the Commission . . . finds that any such rate . . . causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, . . . thereafter to be charged . . . in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination . . . the law of any State or the decision or order of any State authority to the contrary notwithstanding." (49 U. S. C. Sec. 13(4).)

Emergency Price Control Act of 1942 (Section 302(c)) declares: "That nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility . . ." (56 Stat. 23, 36; 50 U. S. C., Sec. 942(c)).

Stabilization Act of 1942 declares that "no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase" (56 Stat. 765; 50 U. S. C., Sec. 961).

STATEMENT OF THE CASE.

This appeal brings up for review the decree (R. 545) of the statutory three-judge District Court wherein the order (R. 507) of the Interstate Commerce Commission was upheld. The I. C. C. ordered appellees (North Carolina rail lines) to increase their civilian[2] coach-fare rates within the

[2] Confined to "civilian" because the lower charges paid by United States Government for troop movements and the 1.25 cent fares maintained for service men and women traveling on furlough or within thirty days after their discharge from the service are not here involved.

State of North Carolina from 1.65 cents to 2.2 cents per mile, that is to say, from the basis or level required by the North Carolina Utilities Commission to the interstate level of such fares prescribed by the Interstate Commerce Commission for general application. The order so upheld also required the round-trip fares for civilian travel in coaches over the lines of these appellees in North Carolina to be increased from amounts, with varying limits, to the uniform basis of 1.98 cents per mile, good for three months, that is, to be the same as the interstate level. The round-trip rate of 1.98 cents per mile is less than the one-way rate of 2.2 cents per mile. It is unnecessary to discuss the lower round-trip rate.

It was following the failure and refusal of the North Carolina Utilities Commission in its order of July 8, 1943, No. 2789 (R. 128-140), to authorize the increase in passenger fares just stated that rail carriers operating in North Carolina, except the Norfolk and Western Railway Company, filed their petition with the I. C. C. (R. 121). It thereupon instituted an investigation of these intrastate fares under the provisions of Title 49, U. S. C., Section 13 (3) (4). The Norfolk and Western Railway Company was not a petitioner before the North Carolina Utilities Commission. It was not a party to the petition to the I. C. C. That was because it already had in effect coach fares of 2.2 cents per mile applicable intrastate on its two lines in North Carolina, one to Winston-Salem and the other to Durham, aggregating approximately 100 miles of railroad within the state. The I. C. C. instituted the investigation by its order dated October 13, 1943, wherein the rail lines, appellees here, were made respondents (R. 141). After a full hearing, it entered the order against respondent rail lines directing that their intrastate coach fares in North Carolina be raised uniformly to the level of the prevailing interstate fares (R. 507). The report and order of the I. C. C. must be read together. *Georgia Comm. v. United States*, 283 U. S. 765, 771.

Upon making a general investigation of interstate passenger fares throughout the country, the I. C. C. in *Passenger Fares and Surcharges*, 214 I. C. C. 174 (1936), found reasonable for general application a rate of 2 cents per mile in coaches in lieu of 3.6 cents, and found reasonable 3 cents per mile in sleeping and parlor cars in lieu of 3.6 cents per mile plus 50 per cent of the charge then generally in effect for sleeping or parlor car space occupied.

In *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the I. C. C. authorized the aforesaid 2-cent rate increased to 2.2 cents and 3 cents to 3.3 cents. (The latter is not here involved.) (R. 521.) This authority, with certain increases in freight rates also therein sanctioned, was granted to enable the railroads to maintain adequate transportation service during the national emergency. These increases were limited to the period of the emergency, that is, until six months after termination of the present war (248 I. C. C., 613). The 2.2-cent fares were made effective interstate February 10, 1942. The railroad regulatory bodies of forty-four states sanctioned the 2.2-cent coach fare for intrastate application in their respective states. Four states refused, North Carolina here immediately involved and Alabama, Tennessee, and Kentucky, whose appeal from a decree of a statuory three-judge District Court of the United States for the Western District of Kentucky, Louisville Division (56 F. Supp. 478), is now before this Court in No. 574, *State of Alabama, et al., Appellant*, v. *United States, et al., Appellees*, October Term, 1944. Separate thirteenth-section proceedings were had before the I. C. C. as to each state's rates and separate hearings were held, but they were argued together before the I. C. C. and one report (258 I. C. C. 133) and order was issued to cover all four proceedings. (R. 69, 507.)

A chronological history of the background of this case was submitted as Appendix B to our brief in No. 560, *State of North Carolina* v. *United States*.

The Price Administrator in the Court below sought to set aside and annul the order of the I. C. C. (R. 507) because the I. C. C. in its said order failed "to accommodate the exercise of its powers to the Congressional policies embodied in the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942" (R. 54). It here assigns error to the District Court "in concluding that there was substantial evidence of record to sustain, consistently with the Commission's duty to give full effect to wartime conditions and the stabilization legislation" (R. 587).

ARGUMENT.

The I. C. C. Made Appropriate Findings on Substantial Evidence and Gave Full Consideration to the Representations of the Price Administration.

This appeal is a companion appeal to that of the State of North Carolina, et al., No. 560, now pending in this Court. In the state's appeal, the same question of lack of substantial evidence to support the order of the I. C. C. was made. We have filed in Docket No. 560 a brief in which we have painstakingly reviewed the findings of the I. C. C. and pointed out the evidence of record in support thereof. This was set out in further detail in Appendix D bound separately and filed with that brief. This broad contention is discussed in our brief in No. 560 at pages 18-20; the findings and supporting evidence in respect of the reasonableness of coach fares on basis of 2.2 cents per mile are discussed at pages 21-34; the findings of preference or prejudice as between intrastate and interstate passengers and the supporting evidence are discussed at pages 34-42; and the findings of unlawful discrimination against interstate commerce and the supporting evidence are discussed at pages 42-48.

The District Court, in a well-reasoned opinion by Circuit Judge Parker, upheld the order of the I. C. C. and dismissed the suit, 56 F. Supp. 606 (R. 548). In that opinion, the

District Court dealt at some length with the contentions of the Price Administrator, (56 F. Supp., 620; R. 570-572). Of the Price Administrator's contention that adequate consideration was not given by the I. C. C. to his representations, Judge Parker said:

> "* * * The record shows that full consideration was given the representations of the Price Administrator, both in the hearings in Ex Parte No. 148 and in the hearing which resulted in the order here involved."

Judge Parker then referred (R. 570) to the fact that the I. C. C., in the reopened *Ex Parte 148* proceeding, pointed out in its report and order of April 6, 1943, why the passenger-fare increase was continued while certain freight increases were suspended, citing 255 I. C. C. 357, 394-395. We quote the I. C. C. from those pages as follows:

> "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects. As we have previously shown, the evidence herein discloses that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated. Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight.
>
> "Fares applicable in sleeping and parlor cars on the present level of 3.3 cents per mile are only slightly higher than the 3-cent basis in effect prior to 1920, and are materially lower than the 3.6-cent fare plus the surcharges that became effective in that year. Interstate coach fares on the present basis of 2.2 cents per mile are 26 percent lower than the 3-cent level prevailing interstate during and before World War I. The actual revenue collected per passenger-mile is considerably below the standard rate of fare, and is influenced by the reduced and special fares accorded, certain of which have been previously discussed, and by the appli-

cation of direct-line fares over circuitous routes. The actual revenues per passenger-mile, all classes including commutation, collected in the years 1921-27, ranged from 3.086 to 2.896 cents. Excluding commutation traffic, the revenues per passenger-mile were 1.90, 1.87, and 2 cents for 1940, 1941, and 1942, respectively.

"Governmental authorities, particularly the Office of Defense Transportation, have urged the public not to travel except when the journey is related to the war effort or is for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel." (255 I. C. C., 394-395.)

Judge Parker then went on to quote from the report of the I. C. C. which accompanied its order here assailed (56 F. Supp., 620; R. 570-571), wherein the I. C. C. had referred to its consideration of the contentions of the Price Administrator in its report in *Increases in Texas Rates, Fares, and Charges,* 253 I. C. C. 723. Of that decision of the I. C. C., Judge Parker went on to say:

"An examination of the report in Increases in Texas Rates, Fares and Charges, 253 I. C. C. 723, 734-736, referred to in the above quotation, shows that the Commission was fully aware of its duty under the Stabilization Act and was discharging it in accordance with the spirit as well as the letter of that act. What weight was to be accorded the contentions advanced by the Price Administrator pursuant to the act, was a matter committed to the discretion of the Commission; and the right to review the exercise of that discretion is given neither to the Price Administrator nor to this Court. Whatever question might have existed with regard to this was set at rest by the recent decision of the Supreme Court in the Jersey City case (322 U. S. 503, 522-523), where Mr. Justice Jackson, speaking for the Court, said:

"'The Interstate Commerce Commission has responsibility for maintaining an adequate system of

wartime transportation. It is without power to protect these essential transportation agencies from raising labor and material costs. It can decide only how such unavoidable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganizations, or they may be offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent. * * * The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. *We think the weight to be given to the Price Administrator's contentions was for the Commission, not the court to determine.* . . . If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions by administrative tribunals.' " (Emphasis supplied by Judge Parker. 56 F. Supp., 620; R. 571-572.)

Since the decree of the District Court was rendered, the I. C. C. has once more considered the representation of the Price Administrator that the passenger-fare increase is incompatible with the Emergency Price Control Act as amended by the Stabilization Act. In its fifth and last report on further hearing in *Ex Parte 148*, dated December 12, 1944, and reported 259 I. C. C. 159, the I. C. C. meticulously reviewed and considered all of his representations and contentions. Passenger traffic was particularly discussed at pages 186-189, and at page 189 the I. C. C. said:

"The Price Administrator again raises the issue that the increases in freight rates authorized and now under suspension and the increases in standard passenger fares should be ordered removed upon the ground

that they are inconsistent with the national effort to control inflation. That matter was fully discussed and considered in our report on further hearing in this proceeding, 255 I. C. C. 357, 368. We adhere to the views there expressed."

From the foregoing, it appears beyond any question that the findings of the I. C. C. are supported by substantial evidence, that it received and thoroughly considered the representations of the Price Administrator in the proceeding before it, and that the same were fully reviewed and considered by the District Court. The Price Administrator has had his day in court and is entitled to no more.

The Price Administrator, Being Unable to Offer Proof of Possible Inflation, Has Taken an Unsound Position with Respect to Railroad Earnings.

The assignment of error (R. 587) and point relied on (R. 592) by the Price Administrator comes to this: The Price Administrator differs with the I. C. C. over the revenue needs of the rail lines. The Price Administrator believes their earnings, without the passenger-fare increase here involved, would be adequate. From that he argues that the I. C. C. may not require the North Carolina intrastate coach fares be increased to the interstate level. The argument of the Price Administrator is unsound. It inevitably leads to the ultimate conclusion that so long as the rail lines are earning anything, the principles embodied in Section 13(4) may not be invoked. In a word, an increase which would increase revenue, of which the rails may not at the moment be in dire need, could not be prescribed.

The answer to that proposition is extremely simple and has heretofore been made in our brief in the North Carolina case, No. 560. It is this: The statute confides to the I. C. C. the authority and duty to determine this very question and, having determined it on substantial evidence submitted and in the light of appropriate procedural steps, neither the Price Administrator nor a court may properly

substitute his or its judgment in the premises for that announced by the I. C. C. Any other course would, quite obviously, defeat the purpose of the Federal statute and would tie the hands of the I. C. C. in performing the duty which the statute lays upon it. That is to say, to so regulate the matter of rates that the revenues therefrom shall be sufficient to maintain a national transportation system, adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.

Stated somewhat differently, the position of the Price Administrator is this: Unless the railroads of the country are in or upon the verge of bankruptcy, the I. C. C. may not function under the terms of Section 13, paragraphs 3 and 4. The authority and duty of the I. C. C. in the premises may not be throttled by any such narrow concept of the purpose of the Congress in enacting Section 13.

One might as well argue that the authority reposed in the I. C. C. to authorize abandonment of a line of railroad (Section 1, paragraph 18)[3] could never be invoked and exercised unless the applicant railroad was in receivership or bankruptcy or so nearly so as to substantially amount to the same thing. The authority granted in respect of abandonments is to overcome an undue burden upon interstate commerce by reason of the continued operation of unprofitable rail lines. It is quite obvious that a railroad company may be highly prosperous and enjoy substantial income and yet have some one or more branch lines on which the traffic has completely dried up and disappeared. Surely it would be idle to argue that the I. C. C. could not authorize the abandonment of such a hopelessly unprofitable line merely

[3] Section 1(18) provides for a certificate of convenience and necessity in respect of extensions of a line of railroad "and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." (Title 49, U. S. C., Section 1 (18).)

because the operations of the applicant, as a whole, show an income, indeed, even a substantial income.

The question whether the present earnings of the railroads are or are not excessive is not one for determination by the Price Administrator or by the courts. By the express terms of the Interstate Commerce Act (Section 15a (2)), the power and duty is imposed upon the I. C. C., in prescribing just and reasonable rates, to give due consideration to "the need of revenues sufficient to enable the carriers, under honest, economical and efficient management" to provide, in the public interest, "adequate and efficient railway transportation service." Upon consideration of the latest available reports of railroad earnings, the I. C. C. has found and declared in *Ex Parte 148* that present revenues, including the revenue derived from passenger fares, are needed for such purpose and "will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof" (255 I. C. C. 393). It has reaffirmed this finding at as late a date as December 12, 1944, in the fifth report in *Ex Parte 148* (259 I. C. C. 159). Such finding by the I. C. C., supported as it is by substantial evidence, may not be set aside by the courts.

It is not without significance that this insistence of the Price Administrator that his voice should control in this matter is a belated effort—an afterthought. The I. C. C., in *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723 (December 18, 1942), pointed out at page 732:

> "At the hearing in Ex Parte No. 148, the Price Administrator did not offer any evidence and did not oppose the increases there sought by the carriers, but, after our decision in that proceeding, he filed a petition seeking suspension of the approved increase on 10 specified commodity groups. The petition was denied. Following discussion with the Price Administrator's staff and others, the carriers undertook to set up a committee composed of traffic executives for the purpose of receiving and passing upon requests by

shippers and by State and Federal agencies for readjustments in rates which might be necessitated by more extensive consideration of the rates on particular traffic or by changed conditions. At the hearing in the instant proceeding in August 1942, the Price Administrator offered certain economic testimony indicating the importance of the price-control program and stressing the point that, as the industrial plant of the Nation approaches full utilization, increases in prices and wages become more serious, but he did not definitely take a position against the increases sought by respondents."

The Price Administrator offered no proof in the *North Carolina case* (Docket 29036) of inflation flowing, or likely to flow, from the increase in coach fares for civilian passengers traveling within the State of North Carolina on the lines of the railroads, appellees here. He was driven to the charge that these railroads already enjoyed adequate earnings. In taking that position, he must have recognized that the question of the carriers' revenue needs in the public service is for the I. C. C.'s determination, Section 15a (2), to say nothing of the transportation policy announced by the Congress. Therefore, to avoid the appearance of putting his view ahead of the conclusion of the I. C. C. on that question of fact, he seeks to state his position as one of law. But, when his assignment of error is examined, it will be found to state a conflict over this question of fact. The assignment concludes with reference to fares "productive of net revenues in excess of those required to meet maintenance and operating costs and to yield a fair return" (R. 587).

So understood, it is not surprising to find the Price Administrator introducing statistical data respecting the revenues of these North Carolina lines (Witness Whitnack, R. 279; Exhibit 20, R. 402). To strengthen his hand (which more clearly shows his real position), he determines an average "rate of return," as he calls it (R. 408-A), of 18.3 per cent for the seven major railroads in North Carolina for

twelve months ending October 31, 1943. He will argue in the face of such a "return" that no question of revenue inadequacy could arise. But we now examine his results:

The "return" he figured varies widely between the seven roads. The Clinchfield Railroad produced the high and the Norfolk Southern Railway produced the low. Yet, the North Carolina Commission, in denying the increase from 1.65 cents to 2.2 cents, said:

> "The evidence which brings the operating results of the seven Class I railroads up through December 31, 1942, indicates a very probable need for additional revenue from coach fares by two of the carriers, viz., Carolina Clinchfield and Ohio Railway and Norfolk Southern Railway Company." (R. 134.)

And, in the supplemental order of May 16, 1944, the North Carolina Commission said:

> "*Ordered*, That the Norfolk Southern Railway Company and the Carolina Clinchfield and Ohio Railway be and the same are hereby authorized to increase their one-way fares for intrastate transportation of civilian passengers traveling in coaches to 2.2 cents per mile, and to increase their round-trip fares for civilian passengers traveling in coaches to the basis of 180 per cent of the one-way coach fares of 2.2 cents per mile or 1.98 cents per mile traveled. Said round trip fares to be subject to a limitation of three months." (R. 27.)

In this connection, we point out that of the Clinchfield's total mileage of 308 miles 117 are in North Carolina; Norfolk Southern has 734 miles with 634 miles in North Carolina. Judging by those figures, North Carolina intrastate traffic is already a drag on the Norfolk Southern Railway (R. 321).

Again the frailty of figures such as the Price Administrator has furnished is shown by the fact that he has lumped into his conclusions the results of operations of large lines, such as the L. & N. of 4,745 miles with but thirteen miles in North Carolina (R. 321).

The Price Administrator reaches those "returns" by arriving at "net railway operating income" before deducting Federal income taxes, and also excluding expenditures for rents for leased roads and equipment (R. 408-A).

Taking the latter first: If a railroad does not pay for rent of roads it holds and operates under lease, the lessors will not sit idly by. To take away such a road would, in the majority of cases, disrupt the railway system of the lessee, hardly to the public good.

Again, railroad cars, under modern needs of the commerce of our country, can not be confined to the lines of their owners. They are, and must be, interchanged under load in order to reach ultimate destinations. The road using on its line such a car of foreign-line ownership must pay for such use.

Finally, the calculation of a rate of return without considering Federal taxes distorts the picture even further. There are some things, like omitting a dividend, a railroad company may do and still survive, but failure to pay its taxes is not one of them. In this respect, it is no different from any other industry or individual citizen. Taxes come first, and, may we say, particularly "Federal taxes." Yet, these are the ones the Price Administrator would ignore in figuring a fair rate of return for these railroads.

In comparison with this forced result to support the Price Administrator's position, we submit the "returns" of record as we have shown them (R. 315, 318, 319, 320):

For many years past passenger operations of these railroads have been in the red. For Atlantic Coast Line, Clinchfield, L&N, Norfolk Southern, Seaboard, and Southern, the six principal railroads here involved, from 1936 to 1940, both inclusive, in a range from 16 to 19 millions of dollars, the average deficit has been 18 millions. In 1941 there was a drop to 8 millions. In 1942 there was an income of 27 millions. The average deficit for the seven-year period (1936-42) was 10 millions. The six-year cumulative

deficit, 1936 to 1941, both inclusive, was 99 millions, in order to offset which at least four years as good as 1942 must be anticipated. (R. 318.)

Railroads of the Southern Region, in common with railroads of the country in general, are chronically in need of additional revenue. For example, for the average of ten years (1921-30) Class I railroads of Southern Region earned only 4.20 per cent on their investment in railway property used in transportation service. (R. 319.)

For the succeeding twelve years (1931-42) the yield was but 2.48 per cent, while for the 22-year period (1921-42) it was but 3.23 per cent (R. 319).

Specifically, for the 22-year period (1921-42), petitioners herein earned only 3.41 per cent on their investment (R. 320).

The Interstate Commerce Commission found in this case:

> "Protestants point out that these seven respondents in the last 2 years have been able to take care of their increases in operating expenses and railway tax accruals, and still show consistent and substantial increases in their net railway operating income. The relation of net railway operating income to investment in railway property including cash, materials, and supplies, for these respondents reflects average rate of return, after Federal income taxes, as follows: 1938, 2.98 per cent; 1939, 3.76 per cent; 1940, 3.95 per cent; 1941, 5.41 per cent; and 1942, 5.78 per cent." (258 I. C. C., 149; R. 89.)

In this connection, we quote further from the same report:

> "Economic conditions since then have greatly changed, and the railroads today, instead of trying to attract passenger traffic, are endeavoring to discourage unnecessary travel, and are cooperating with the Office of Defense Transportation in its effort to avoid the rationing of passenger travel." (258 I. C. C., 137; R. 75.)

"• • • The evidence (fol. 112) here before us does not indicate that the passenger traffic of these respondents as a group is producing more than a fair return." (258 I. C. C., 149, 150; R. 89.)

"The transportation conditions bearing upon the reasonableness of the interstate fares have not changed materially since the adoption on April 6, 1943, of our report on further hearing in Ex Parte No. 148, wherein we declined to disturb our prior finding that the increased interstate fares then and now in effect were just and reasonable. Upon the records in the instant proceedings, we can find no warrant for changing our views that a basic coach fare of 2 cents per mile, plus an additional 10 per cent for the duration of the war, is reasonable for general application. Such a fare is now in effect for one-way application generally throughout the country, except intrastate in the four States the fares in which are here before us. Also, the respective round-trip fares for application in coaches and in sleeping and parlor cars are uniform generally throughout southern territory, except intrastate in these four States on traffic in coaches and intrastate in Alabama and Tennessee on traffic in sleeping and parlor cars." (258 I. C. C., 153; R. 94.)

Nothing in this record shows inflation or any tendency toward inflation. The average coach traveler in North Carolina journeys thirty miles (R. 170). One-half cent (1.65 to 2.2) per mile means only 15 cents per trip. Whether the trip is for business or pleasure, 15 cents could hardly produce inflation.

But the total of these small items may be stressed. The total is large and thereby important to these railroads. However, reverting to the Price Administrator's own idea about Federal taxes, excess profits, surcharges, etc., it quite obviously appears that the very excess earnings, as he sees it, go right into the Federal treasury. There could be no inflation from such payment; just the contrary. We marvel that the Price Administrator and the Secretary of the Treasury are not here supporting us.

If the Price Administrator is sound, his position comes to this: The I. C. C. should regulate railroad rates to wipe out the excess profits tax and surcharges. If so, we ask, why not wipe out all taxes, State as well as Federal? We submit that should that be done, it would not help defeat inflation, except by the strangulation and suspension of business which obviously would not be in the public interest. But, aside from that, such a regulation of railroad rates can not be accomplished. These railroads must make their income tax returns and pay their income taxes as accrued on each year's operations. These payments are usually in quarterly installments. Subsequently, whenever events justify it overpayments are claimed such, for instance, as arise from such items as the two-year carry back of net losses and unused excess profits credits. When recognized, such overpayments are included as credits in the accounts of the road for the year in which they are actually received. The reverse of this is also true, that is, the road must make appropriate accruals and payments in the year the tax liability is determined for deficiency assessments of income and excess profits taxes applicable to income of prior years. Hence, while the roads pay year by year, several years elapse before these roads know what their final tax bill really was in a given year.

Moreover, should a given road figure out its rate levels (assuming it could be done) in order to obviate some one or more of these taxes, we submit such rate level applicable to it would bankrupt another road. These roads are pretty much competitors. If they are not kept on an even rate keel, one gets all the traffic. Hence, the futility of putting the Price Administrator's idea into actual practice.

The I. C. C. has considered the practical results which grow out of the complicated processes necessary in order to determine the Federal taxes. It did so after having heard the Price Administrator in *Ex Parte 148*. In its last report in that proceeding, 259 I. C. C., 181-182, the I. C. C. said:

"Calculation of income and excess-profits taxes for the railroads is affected by a variety of conditions peculiar to individual companies in the particular year. Many railroad companies have large holdings of government obligations, which for tax purposes are either wholly or partially exempt. For excess-profits tax purposes, 100 per cent of all dividends received are excluded from the tax computation, and 85 per cent of such dividends are excluded for normal and surtax purposes. One year's proportion of any discount on old debt is deductible in computing taxable net income, and where new bonds are floated at a discount, all of the discount can be charged off at once in computing taxes or, if the company so elects, the benefit of the proportionate part of it may be claimed in any taxable year. Similarly, premiums paid in connection with the retirement of debt would be deducted in the computation of taxable income as well as losses on equipment or other depreciable property destroyed by casualties where such losses are not compensated by insurance or otherwise. Owing to the averaging provisions in the computation of excess-profits taxes, the true situation with regard to the amount of taxes ultimately to be paid by any road or all the roads for any year or years will probably not be finally determined until such time as all the adjustments thereunder have been finally made. Under such conditions, the attempt to estimate the amount of future excess-profits taxes is hazardous, if not altogether impracticable."

In *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, Mr. Justice Brandeis, at page 399, said:

"* * * In calculating whether the five-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and federal taxes or between income taxes and others."

A year later, Mr. Justice Brandeis, again speaking for the Court, in *Georgia Ry.* v. *R. R. Comm.*, 262 U. S. 625, at pages 632-633, said:

"The companies contend that there was error, also, in estimating the amount of the probable net income. One objection relates to the federal corporate income tax (10 per cent.) assumed to be $45,364. The Commission treated the tax as a proper operating charge. The court disallowed it; and thus increased its estimate of probable net income. In this the court erred. *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388."

However, in *Galveston Elec. Co.* v. *Galveston*, immediately after the quotation above set out, Mr. Justice Brandeis went on to say:

"* * * But the fact that it is the federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair. For under §216 the stockholder does not include in the income on which the normal federal tax is payable dividends received from the corporation. This tax exemption is therefore, in effect, part of the return on the investment."

We think this last observation of the Court has given rise to misunderstanding in respect of Federal taxes. However, as the credit allowed in Section 216 of the Revenue Act of 1918 (40 Stat. 1069) is no longer applicable, we think it is unnecessary to pursue the matter further. For with the credit no longer allowed it would seem that the first quotation from the *Galveston case*, affirmed in the *Georgia Ry. case*, clearly states the view of the Court beyond any question.

The I. C. C., in its last report in *Ex Parte 148*, 259 I. C. C., 189, said:

"Nothing in the record shows that the 10-percent increase in passenger fares has had any inflationary effect."

We submit that it is clear beyond any question that as the Price Administrator recognized he could not make proof of inflation or the likelihood of inflation in respect

of passenger-fare increases here dealt with that he was forced to a position in respect of railroad earnings and revenue needs which is inherently unsound.

The I. C. C.'s Finding of Preference or Prejudice as Between Persons Traveling in Intrastate and Interstate Commerce, in Which the Price Administrator Has No Interest, Amply Supports the I. C. C.'s Order.

The report (R. 69-96, 258 I. C. C. 133) of the I. C. C., upon which the order (R. 507-508) here assailed was entered, makes adequate findings supported by evidence of two separate and distinct factual situations; that is, it found the lower state fares caused:

(1) Preference or prejudice as between persons traveling in intrastate commerce, on the one hand, and interstate commerce, on the other hand; and

(2) Discrimination against interstate commerce.

Section 13 (4) of the Act declares both of the foregoing to be unlawful. Here the finding is as to both. A finding in respect of either the one or the other would suffice to support the order. Hence, we at once point out that, for the moment laying aside the finding of discrimination against interestate commerce, the record stands with a finding of preference or prejudice as between persons traveling in the two classes of commerce. It follows that no matter what the views of the Price Administrator may be with respect to the revenue needs of the rail carriers (upon which he challenges the finding of discrimination against interstate commerce) his views are irrelevant and immaterial as to the duty of the I. C. C. to remove the preference or prejudice as between persons, which the Act condemns. In the case of two passengers accorded identically the same service no valid reason could possibly exist for charging the intrastate passenger only 1.65 cents per mile while charging the interstate passenger 2.2. cents per mile.

The I. C. C.'s finding of preference or prejudice as between such travelers was clearly made, and is amply supported of record. We have stated the findings and the supporting evidence at pages 34-42 of our brief in the North Carolina case, No. 560, and in Appendix D thereto. One of the Commissioners of the North Carolina Utilities Commission, testifying before the I. C. C., made it clear that it is generally true that these interstate and intrastate passengers are handled under the same conditions and on the same trains (R. 254). Indeed, the order of the North Carolina Commission refusing to sanction the increase which gave rise to these proceedings found that, in the very nature of things, the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together (R. 140).

There can be no doubt of the correctness of the I. C. C.'s finding in respect of this phase of the case. Standing alone, it supports the order here assailed. The Price Administrator's views with respect to revenue needs are entirely outside the issues in this phase of the case. We thus find a complete answer to the Price Administrator's appeal. The order stands squarely on this one phase as to which the Price Administrator may not be heard and in which he is not interested. It is really unnecessary to consider the views he puts forth in respect of the other phase.

The Price Administrator Was Not Entitled to a Trial De Novo in the District Court.

The effort of the Price Administrator to proceed in the District Court as if a trial *de novo* and thereby justify the introduction of evidence outside and beyond the record made before the I. C. C. failed. Judge Parker, speaking for the Court, said:

> "We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its compe-

tency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record. For the reasons above stated, however, our decision would not be different if this evidence were admitted and considered." (56 F. Supp., 621; R. 571-572.)

The Price Administrator in his appeal at bar has taken no assignment of error to that ruling and decision of the District Court.

Decisions of this Court Are Controlling of the Price Administrator's Appeal.

The contentions that the Price Administrator makes here have been answered in three decisions of this Court. Each one of these decisions affords ample authority for affirming the lower court's decree on the Price Administrator's appeal.

Davies Warehouse Co. v. *Bowles (Price Administrator)*, 321 U. S. 144, involved charges of a public warehouse. Mr. Justice Jackson, speaking for the Court, referred to the provision of the Emergency Price Control Act that "nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility, * * * " (p. 146). It was held Davies' business was that of a public utility within the exemption of the Act, pointing out that the warehouse company was subject to the State's Railroad Commission under its Utilities Act (p. 156).

Vinson, Director v. *Washington Gas Light Co.*, 321 U. S. 489. Here gas rates were involved which had been considered by the Public Utilities Commission of the District of Columbia. Mr. Justice Roberts, speaking for the Court, again stressed the exemption found in Section 302 (c) (2) of the Emergency Price Control Act (p. 494), and at pages 497-498 said:

"The Emergency Price Control Act of 1942, while it gives the Administrator power over prices of 'commodities,' which are not generally regulated by public authority, specifically and expressly withholds from the Administrator jurisdiction over public utility rates. And, as we have noted, the Stabilization Act of October 2, 1942, did not alter this prohibition but required merely that no utility should generally increase rates in effect September 15, 1942, unless it first gave thirty days' notice to the President or his representative and consented to the timely intervention of that representative before the federal, state, or municipal authority having jurisdiction to consider the increase.

"It is not clear that this language confers a right of intervention. The bill as passed by the Senate contained a provision that there should be no increase in utility rates unless they were approved by the President. The House refused to concur, with the result that only the language now contained in the proviso appeared in the bill. The assertion that, while the Price Administrator or the Director may present his views to the regulatory body 'he had nothing to say about its decision,' was made and not contradicted on the Senate floor in discussion of the conference report. Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation, but in both the original Act and the amendment, as this court has recently said in *Davies Warehouse Co.* v. *Bowles*, (321 U. S. 144, 64 S. Ct. 474, 480) was careful 'to avoid paralyzing or extinguishing local institutions.' Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises."

I. C. C. v. *Jersey City*, 322 U. S. 503, involved passenger fares on the line of the Hudson & Manhattan Railroad. Mr. Justice Jackson, speaking for the Court, considered the reasons given by the lower court for setting aside the orders

of the I. C. C.; one was that it "lightly brushed aside" the economic-stabilization phase of the case and gave too little weight to the Price Administrator's contentions (p. 519). Of that he said:

> "• • • Congress was free to apportion their functions as it saw fit and to transfer any part of the normal responsibility of the Commission to the Price Administrator or other executive agencies. Commerce Commission authorization of rate increases could have been subjected to review or veto so far as any objection of the Commission is concerned.
>
> "But Congress did no such thing. The legislative history of relevant provisions of the Act was reviewed in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144 It was there pointed out that Congress rejected a proposal that such rates should not be increased without consent of the President. On the other hand it was assured by executive representatives that rate advances already subject to scrutiny on behalf of the public and to proof of reasonableness were not the source of the more substantial inflationary threats. Congress then adopted the provision we earlier quoted.
>
> "• • • Under this statutory plan, as we have said in the language of Mr. Justice Douglas, 'The Administrator does not carry the sole burden of the war against inflation.' *Hecht Co.* v. *Bowles*, 321 U. S. 321, 325, 331.
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> • • • • • • • • •
>
> "• • • The opinion of the Administrator is not, as we have pointed out, mandatory on the Commission. Nor is such an economic judgment the function of the courts unless all that has been established in administrative law concerning the limitation on judicial review is to be thrown overboard. The decision of such a matter by the Commission is clearly not reviewable by a court because it thinks differently of the weight that should be accorded to some factors in relation to others.
>
> "The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transportation. • • • The need for informed, expert

and unbiased judgment is apparent. The problem is intricate, the carrier is one of peculiar characteristics, its wartime traffic is of varying density, with peaks and rush hours, the rates and carrying capacities of competitors by bus and ferry are involved in any estimate of traffic diversions or probable effects of rates. What rates are required to meet actual and proper operating expenses, what revenue must be available to avoid defaults and sustain credit, what divisions should be made on interchanged traffic are as complex problems in rate-making as can readily be imagined. The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. We think the weight to be given to the Price Administrator's contentions was for the Commission, not the Court, to determine." (pp. 519-523.)

We submit the above authorities are controlling here.

CONCLUSION.

In conclusion, we submit that the I. C. C. has made appropriate findings on substantial evidence and has given full consideration to the representations of the Price Administrator; that the Price Administrator, being unable to offer proof of possible inflation, was forced to take an unsound position in respect of railroad earnings in an effort to support his opposition to the increase in passenger fares here involved. We further submit that the I. C. C.'s finding of preference or prejudice as between persons traveling in intrastate and interstate commerce, with which the Price Administrator has no concern, amply supports the order so that whether the position of the Price Administrator is upon sound or unsound grounds the order of the I. C. C. was appropriately sustained in the lower court. Further we submit the Price Administrator was not entitled to a trial *de novo* in the District Court. Finally, we confidently submit that the recent decisions of this Court rule the questions raised by the Price Administrator

in his appeal at bar, and that the decree of the lower court should be affirmed.

Respectfully submitted,

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APPENDIX.

Extract from Interstate Commerce Act, Part I, 49 U. S. C., Section 13(4):

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Extract from Emergency Price Control Act of 1942, 50 U. S. C., Sec. 942(c), 56 Stat. 23, 36:

"* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) *rates charged by any common carrier or other public utility*, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services." (Emphasis supplied.)

Extract from Stabilization Act of 1942, 50 U. S. C., Sec. 961, 56 Stat. 765:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.*" (Emphasis supplied.)

SUPREME COURT OF THE UNITED STATES.

Nos. 560, 561.—October Term, 1944.

State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., et al., Appellants,
560 *vs.*
The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al.

William H. Davis, Economic Stabilization Director, by Chester Bowles, Price Administrator, Appellants,
561 *vs.*
The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al.

On Appeals from the District Court of the United States for the Eastern District of North Carolina.

[June 11, 1945.]

Mr. Justice Black delivered the opinion of the Court.

The North Carolina State Utilities Commission brought suit to enjoin enforcement of an order of the Interstate Commerce Commission. 258 I. C. C. 133. The Federal Economic Stabilization Director acting through the Price Administrator sought and was granted the right to intervene as a party plaintiff. A federal district court of three judges denied the injunction, 56 F. Supp. 606, and the case is here on direct appeal under § 210 of the Judicial Code.

This clash between state and federal agencies came about because the State Commission and the Interstate Commerce Commission each claimed the paramount power to fix railroad rates in North Carolina. The North Carolina Commission ordered railroads doing business in the state to charge no more than 1.65 cents per mile for carrying intra-state coach passengers from one point in the state to another. Despite this State Commission order, the Interstate Commerce Commission authorized the same

railroads to charge 2.2 cents per mile for the same type of carriage.[1]

The Interstate Commerce Commission asserted its power to prescribe these purely intra-state rates under § 13(4) of the Interstate Commerce Act. 49 U. S. C. § 13(4). That section, which is set forth below,[2] empowers the Interstate Commerce Commission to prescribe intra-state railroad rates under certain conditions, despite conflicting state orders as to the same rates. The conditions that Congress imposed as a prerequisite to Commission action are that the Commission shall hold a "full hearing" and find that the state-prescribed rates either caused (1) undue or unreasonable advantage, preference, or prejudice, as between persons or localities in intra-state commerce on the one hand, and interstate commerce on the other hand, or (2) undue, unreasonable, or unjust discrimination against interstate commerce. The Commission held hearings which are challenged on various grounds as falling short of "full" hearings. It made findings and concluded that the 1.65 state rate was unduly prejudicial to interstate passengers, and that the state rate constituted an undue and unjust discrimination against interstate commerce. These conclusions are attacked on the ground that they are supported neither by findings nor evidence. The crucial question involved in all these contentions is whether the indispensable prerequisites to the exercise of the Federal Commission's power over intra-state rates have been shown to exist with sufficient certainty. Before making any detailed reference to the hearings, findings or

[1] There is a corresponding conflict which involves round trip coach rates. The questions presented are the same with regard to one way and round trip rates, and we shall therefore consider both of them by reference to the one way rate.

[2] "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." 49 U. S. C. § 13(4).

evidence, it would be helpful to set out certain guiding principles which lead us to a resolution of the crucial question.

Section 13(4) does not relate to the Commission's power to regulate interstate transportation as such. As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. See *United States et al.* v. *Penn. R. R. Co., et al.*, Nos. 47-48, decided January 29, 1945. No such breadth of authority is granted to the Commission over purely intra-state rates. Neither § 13(4), nor any other congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intra-state rates. Since the enactment of § 13(4), as before its enactment, a state's power over intra-state rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.

Intra-state transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. *American Express Co.* v. *South Dakota*, 244 U. S. 617, 625. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet "a high standard of certainty." *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510. Before the Commission can nullify a state rate, justification for the "exercise of the federal power must clearly appear." *Florida* v. *United States*, 282 U. S. 194, 211-212. See also *City of Yonkers* v. *United States*, 320 U. S. 685. And the intention to interfere with the state's rate-making function is not to be presumed. *Arkansas Commission* v. *Chicago, etc., R. R.*, 274 U. S. 597, 603; nor must its intention in this respect be left in serious doubt. *Illinois Commission* v. *Thompson*, 318 U. S. 675, 684-685. The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission. We shall now take up the two grounds upon which the Commission set aside the state order.

Prejudice Against Interstate Passengers. On this aspect of the case the Commission's findings were that the interstate 2.2 cents rate was just and reasonable; that the accommodations afforded interstate and intra-state passengers in North Crolina were "substantially similar"; that in general these passengers traveled in the same trains and in the same cars; and from these, it concluded that since interstate passengers were forced to pay higher fares than intra-state passengers, there was an undue and unreasonable disadvantage and prejudice of interstate passengers. On these findings it issued the statewide order requiring all intra-state passengers to pay 2.2 cents per mile. We think these findings failed to give adequate support to the order.

In effect, the Commission's holding was, and its argument is here, that § 13(4) automatically requires complete uniformity in intra-state and interstate rates. That argument is in short that under our national transportation system interstate travelers and intra-state travelers use the same trains; for a state to fix a lower intra-state rate than the interstate rate is therefore an undue advantage to the intra-state passengers and an unfair discrimination against the interstate passengers. If Congress intended to permit such an oversimplified form of proof to establish "unjust discrimination", then its requirement of a "full hearing" was mere surplusage. In fact, it need have provided for no hearing at all since it could have easily stated in its legislation that intra-state rates shall never be lower than interstate rates. The argument of the Commission in this regard runs counter to the language of § 13(4), and would call for a declaration by us that Congress intended by this section to reverse the entire transportation history of the nation. The clause about "persons" and "localities" is as the legislative history shows, a practical enactment into law of a decision of this Court in the "*Shreveport*" case.[3] *Houston and Texas Ry. Co.* v. *United States*, 234 U. S.

[3] The House Committee reporting this bill said with reference to the provisions of Sec. 13(4): "After such hearing the Commission shall make such findings and orders as may in its judgment tend to remove any undue advantage, preference, or prejudice as between persons or localities in state and interstate or foreign commerce. The provision practically enacts into law the decision of the Supreme Court in the so-called 'Shreveport' case. Any undue burden upon interstate or foreign commerce is forbidden and declared to be unlawful. It is believed that the provisions of this section will have a beneficial and harmonizing effect, and will tend to reduce the number of so-called 'Shreveport' cases, while at the same time recognizing the regulatory bodies of the several states." Report No. 456, 66th Cong., 1st Sess., p. 20.

342. In the "*Shreveport*" case the Commission found from evidence that certain Texas intra-state rates to Texas points were far below the interstate rates charged to carry the same types of freight from Shreveport, Louisiana. The distances and conditions of both transportations were found to be substantially the same. The Court sustained the Commission's conclusion that the Texas intra-state rates constituted an unfair discrimination against Shreveport and persons doing business there. The Commission's order was not statewide, but only required removal of the discrimination against the particular localities and business groups affected by the discrimination.

In *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 579, 580, this Court refused to sustain a Commission order nullifying all state passenger rates because of a discrimination against interstate travelers and against localities. The Commission had found there as here that state and interstate passengers rode on the same trains in the same car and perhaps in the same seats. It had found there, as it did here, that this constituted an undue discrimination against interstate passengers, and it issued a general sweeping order against all intra-state passenger rates. This Court pointed out that the order went far beyond the principles announced in the *Shreveport* case, and declined to sustain the statewide order on this phase of the case. See also *Florida* v. *United States*, 282 U. S. 194, 208. So here, the finding that interstate passengers paid higher fares than intra-state passengers for the same facilities is an inadequate support for nullifying state rates on the ground that they constitute unjust discrimination against interstate passengers.

Discrimination Against Interstate Commerce. One ground of the Commission's order was that the intra-state rates discriminated against interstate commerce as such. The findings of the Commission on which this conclusion rested were that the 2.2 cents interstate rate was just and reasonable; the same trains in general carried both interstate and intra-state passengers; the North Carolina railroads to which the intra-state rates were applied, would have received $525,000 more annual income from the passengers they carried had the 2.2 cents interstate rate been applied; from this the conclusion was reached that intra-state traffic was "not contributing its fair share of the revenue required to enable respondents to render adequate and efficient transportation service."

This conclusion of the Commission, if based on findings supported by evidence, would justify its order. For in *Florida* v. *United States*, 292 U. S. 1, 5, we said that § 13(4) authorized the Commission "to raise intra-state rates so that intra-state traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intra-state." We sustained the Commission's order there because it was based on findings supported by evidence that the intra-state rate "was abnormally low and less than reasonably compensatory . . . insufficient under all the circumstances and conditions to cover the full cost of the service." Neither in its formal findings, nor in its discussion of the facts did the Commission indicate that the North Carolina railroad rates here involved were less than compensatory or insufficient to cover the full cost of service. Nor did they find that maintenance of these rates was necessary to the operation of a nationally efficient and adequate railway system.[4]

[4] In Railroad Commission v. Chicago B. & I. R. Co., 257 U. S. 563, this Court sustained a statewide Commission order raising intrastate rates. Section 13(4) in the context of the 1920 Transportation Act, 41 Stat. 456, as it then existed, was construed as requiring the Commission to prescribe rates sufficient "to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation." 584-585. The 1920 Act, however, treated the national railway system as a unit. The net returns for any particular railroad were limited by the Act. . . . All above this limitation went into a common pool to be distributed for the use of weak railroads. In this way, all railway income inured to the benefit of all the railroads individually and collectively to aid in "maintaining an adequate railway system." This Court has said that Congress adopted the pooling provisions because "it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties." New England Divisions case, 261 U. S. 184, 191. But Congress in 1933, 48 Stat. 211, repealed this part of the 1920 Act; the income pooling system was abandoned; the rule of rate making was re-written, and while the Commission was to give consideration to the need of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenue sufficient to enable the carriers under honest, economical and efficient management to provide such service, the rates were no longer to be treated on a national basis as though all railroads constituted one system. House Report No. 193, 73rd Cong., 1st Sess., pp. 30-31. Railroads were to be treated on an individual basis. Abandonment of the profit pooling system made this necessary to carry out the continuing Congressional purpose to prevent "an unreasonably large return upon the value of their properties." The Commission recognized this legislative change in rate making policies by its reference to "revenues required to enable *respondents* to render adequate and efficient transportation service." The "respondents" referred to were the individual railroads to which North Carolina's order applied.

But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intra-state passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intra-state traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intra-state rate fixed by North Carolina. It thought this action was justified by this Court's opinion in *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 485.[5] Aside from the fact that "The mere existence of a disparity between particular rates on intra-state and inter-state traffic does not warrant the Commission in prescribing intra-state rates", *Florida* v. *United States*, 282 U. S. 194, 211-212; *Utah Edible Livestock Rates and Charges*, 206 I. C. C. 309, there is reasonable doubt as to whether the Commission had ever fixed 2.2 cents as the only reasonable interstate rate.

The whole argument that it had done so rests primarily on an order made in 1936. At that time, the Commission made a comprehensive investigation of rates throughout the nation, and after elaborate discussion made findings of fact. It concluded that any rate over 2 cents per passenger mile would be unreasonable and unlawful. But it also declared that a rate of 1.5 cents then commonly charged throughout the Southern states, would not be "unreasonable or otherwise unlawful." 214 I. C. C. 174, 257. Railroads in the South continued to charge 1.5 cents most of the time from then until 1942. March 2, 1942, upon an application of the American railroads, the Commission in *Ex parte 148*, granted a general 10% increase on all rates then in existence. This increase it found was necessary to enable the railroads "to continue to render adequate and efficient railway transportation service during the present emergency." 248 I. C. C. 545, 565. The Commission specifically stated, p. 606, that its conclusion

[5] This case did not involve a sweeping statewide order based on general railroad revenue needs. It related to a problem like that considered in the *Shreveport* case. The rates involved applied to switching movements in a single "Switching District", "essentially a unit, so far as switching movements are concerned." This Court's holding in that case does not support the statewide order here.

was not based on "individual, sectional, or particular industrial desires or needs." Four months later, on July 14, 1942, certain railroads operating in the South including the railroads involved in the *North Carolina* case, filed a petition with the Commission asking that it modify its 1936 order, so as to permit them to charge 2.2 cents per mile. Two weeks later, without a hearing, without evidence, and without discussion, the Commission entered an order declining to amend its 1936 order, but modifying its 10% rate increase order, "so as to *authorize*" the petitioning railroads to charge 2.2 cents per mile. It made no finding that the railroads needed this increase in order to maintain adequate railroad systems and of course could not have done so unless it relied upon the old 1936 evidence. There was no issue of this nature raised by any of the parties in the 10% rate increase proceedings. Neither before nor since these Southern railroads were authorized by the Commission to increase their interstate rate to 2.2 cents has any hearing been held on the subject. Petition of North Carolina for a hearing was denied. Nor has there been any finding based on evidence that the 1.65 cents rate which the Commission found adequate, and neither "unreasonable nor unlawful" has ceased to be such. We are unable to find from any of the various orders that the Commission has ever yet made findings supported by evidence and upon them set aside its 1936 conclusions that a 1.5 cents rate for Southern territory was reasonable and lawful, except to the extent that it held that a 10% increase was justifiable.

Furthermore, even assuming that the Commission had previously made a valid 2.2 cents per mile general order broadly applicable to all railroads in the Southern territory or throughout the nation, it does not follow that such a general order must permanently stand as to each and every separate railroad or railroad system. The very nature of such a broad general order requires that it contain a saving clause for future modification and adjustment of particular rates. This Court declared that such a saving clause was essential even at the time that all surplus railroad profits were pooled for the common good of the national system. *Railroad Commission* v. *Chicago B. & I. R. Co.*, 257 U. S. 563, 579; *Georgia Commission* v. *United States*, 283 U. S. 765, 772; *United States* v. *Louisiana*, 290 U. S. 70, 76, 77, 79.

Such a saving clause left to the state its power to bring about particular changes in the internal intra-state rate structure neces-

sary to keep intra-state revenues as a class in harmony with interstate needs. *Railroad Commission* v. *Chicago B. & I. R. Co.*, 257 U. S. 563, 580. For the Interstate Commerce Commission was "without jurisdiction over intra-state rates except to protect and make effective some regulation of interstate commerce." *Illinois Comm'n* v. *Thomson*, 318 U. S. 675, 684. Consequently, no one but the state had power to readjust its internal intra-state rate structure. This it undertook to do by a hearing focussed upon the state railroads individually and collectively. Four railroads were denied the increase, and they are the only ones now affected by the Interstate Commerce Commission order. Other roads were granted the increase. Its order to this effect rested on evidence as to the differing qualities of intra-state and interstate accommodations afforded as well as the net revenues of different roads. The State Commission found as to the four roads which it denied an increase that their profits from passenger revenues even on a 1.65 cents rate were so great that continuance of that rate would be reasonable and just to them.

In the proceedings before the Interstate Commerce Commission, the state and the Price Administrator presented these issues which the State Commission had considered. Both the railroads and their adversaries offered evidence on the points. There was evidence that the four railroads were carrying more passengers and more freight, and were more prosperous than they had ever been in their history. This evidence showed that they were in the highest excess profit tax brackets, and that somewhere between 80 and 90% of all their profits were subject to be paid for federal taxes.

There was evidence offered by the railroads, which indicated that their 1942 per mile net cost of carrying coach passengers was under or about 1 cent. The Commission had found facts in the 1936 report, 214 I. C. C. at pp. 216, 266, which indicated a mileage coach passenger cost of 3.25 cents. Evidence of the four railroads also showed their average revenue increase since 1936 had been approximately 250%. This great revenue increase transformed a 1936 $16,426.00 deficit of six North Carolina roads, including the four here involved, into a 1942 $26,699,988.00 profit. Most of this increased profit was shown to have been derived from passenger revenues.

All of this evidence and much more to which we might advert was sufficient to show that the Commission might have found, had it made any findings on the subject at all, that a 1.65 cents rate for these four North Carolina railroads would have been a fair coach passenger contribution to revenues required to enable them to operate profitably and efficiently. But it made no findings on this subject at all. The purpose of the National Transportation Law is to assure railroads a fair net operating income and no more. *Dayton-Goose Creek Railway* v. *United States*, 363 U. S. 456. The power of the Commission to require states to raise their intra-state rates depends upon whether intra-state traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to *yield a fair return on the value of property directed to the transportation service* both interstate and intra-state. *United States* v. *Florida*, 290 U. S. 70, 75. But the Commission cannot "require intra-state rates to be raised above a reasonable level." *United States* v. *Florida*, *supra*, 78. And where there is evidence as here from which the Commission could have found that a rate of 2.2 cents was far above a reasonable rate level for the intra-state coach traffic of these four railroads, the Commission must make findings on that issue, which findings are supported by evidence, before entering an order supplanting the state authority. Without such findings supported by evidence, the Commission was not authorized to find that the intra-state rates discriminated against interstate commerce.

Because the order of the Commission was not based on adequate findings, supported by evidence, the District Court should have declined to enforce its order. The judgment of the District Court is

Reversed.

SUPREME COURT OF THE UNITED STATES.

Nos. 560-61.—October Term, 1944.

State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., et al., Appellants,
560 *vs.*
The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al.

William H. Davis, Economic Stabilization Director, by Chester Bowles, Price Administrator, Appellants,
561 *vs.*
The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al.

Appeals from the District Court of the United States for the Eastern District of North Carolina.

[June 11, 1945.]

Mr. Justice Reed, dissenting.

The Court has set aside an order of the Interstate Commerce Commission which was entered May 8, 1944, on a Commission report of the preceding March 25th. 258 I. C. C. 133. The order covered investigations instituted upon separate petitions of carriers in North Carolina, Kentucky, Alabama and Tennessee to determine whether the maintenance of intrastate fares in these states at levels below fares and charges established for application to interstate traffic in respective states on October 1, 1942, caused undue or unreasonable advantage, prejudice or preference between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other, or any such discrimination against interstate commerce. 49 U. S. C. § 13(4). The petitions sought, too, prescription of fares and charges by the Commission to remove any preference, advantage, prejudice or discrimination found to exist. See also *Alabama et al.* v. *United States et al.* and *Davis* v. *United States et al.*, Nos. 574 and 592,

decided today. This dissent is applicable both to this and that opinion.

Without summarizing the entire report we call attention to a finding which it contains that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable appellees (the interstate carriers) to render adequate and efficient transportation service and that this "unlawfulness should be removed by increasing" the intrastate fares to the level of the interstate fares. 258 I. C. C. 154, 155, Findings 5 and 6. This finding, if supported by evidence, is in our opinion sufficient to justify the applicable order of May 8th which is under review in this appeal. That order required the carriers to maintain and apply intrastate fares on bases no lower than those applied by the carriers in interstate transportation to, from and through the four states.

The Interstate Commerce Commission has the power to make this order on a valid finding of such discrimination against interstate commerce. 49 U. S. C. § 13(4). It has long been established that this section delegates a valid power of regulation of intrastate rates to the Commission. *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563. Cf. *Minnesota Rate Cases*, 230 U. S. 352, 432, and *Houston & Texas Ry.* v. *United States* (the *Shreveport* case), 234 U. S. 342, 351. It gives authority to the Commission to raise intrastate rates so that that traffic may produce its fair share of the required earnings. *United States* v. *Louisiana*, 290 U. S. 70, 75. And that authority does not depend upon the recapture, in whole or in part, of excess earning of individual railroads under the requirements of the Transportation Act of 1920, 41 Stat. 488, Sec. 15a, now repealed. Emergency Railroad Transportation Act, 1933, 48 Stat. 220, Sec. 205, for creation of a general railroad contingent fund for financing the national transportation system of railways. Section 13(4) was not changed by the Act of 1933. This section in conjunction with the revised and reenacted Section 15a of the Interstate Commerce Act now empowers the Commission, in accordance with the statutory provisions, to remove the discrimination against interstate commerce by prescribing intrastate fares.[1] *Florida* v. *United States*, 292

[1] The present Section 15a, 49 U. S. C., reads as follows:

"(1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the

U. S. 1, 4. First. Cf. *Illinois Comm'n* v. *Thompson*, 318 U. S. 675, 682. This Court today recognizes this rule. The four states attack the finding of discrimination against interstate commerce which finding is essential to the validity of the present order to maintain intrastate fares at the level of interstate fares, on the ground that there is neither finding nor evidence that the intrastate rates are not producing a proper proportion of the carriers' needed revenue. This Court sustains the attack as sufficient to invalidate the Commission order. We think the argument, which the Court has sustained, has its source in a misconception of the purpose of this present proceeding.

The petitions were filed by the carriers, the investigation was made and the order under dispute here was entered to coordinate the intrastate passenger fares in these four states with the passenger fare structure of the entire country. 258 I. C. C. 133. There had been a number of recent proceedings involving the national structure. The evidence, which will be referred to later, presented in those proceedings is, we think, properly to be considered in this investigation and the power of the Commission to require intrastate fares to conform to interstate fares in the four states is to be appraised in the light of a purpose to establish a national passenger rate structure. The Court apparently accepts as a premise the contention of the states that the present proceeding is an isolated investigation by the Commission into an application by the respective carriers in the four states to have their intrastate fares raised to the level of their interstate fares because the intrastate earnings were below a fair proportion of the carriers' total required income.[2] Instead we think that these

effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

[2] Compare the following excerpt from the opinion of the Court:

"But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intra-state passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intra-state traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intra-state rate fixed by North Carolina. It thought this action was justified by this Court's opinion in *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 485."

proceedings are but another step in the comprehensive regulation by the Commission of the general passenger fare structure.

Basic Interstate Fares. The basic passenger fares were first investigated on a national scale by the Commission in *Passenger Fares and Surcharges*, No. 26550, decided February 28, 1936. In this proceeding carrier coach and pullman fares respectively were fixed at not to exceed 2 and 3 cents per passenger mile. 214 I. C. C. 174, 256.[3] The order, see paragraph 3, page 257, left these respondent roads in the southern territory free to continue certain experimental fares, which were as low as 1.5 cents per mile in coaches. A ten per cent increase, applicable to both the basic 2 and 3 cent fares and the experimental fares, was allowed on January 21, 1942, in a proceeding before the Commission, docketed as *Ex parte No. 148, Increased Railway Rates, Fares, and Charges*, 248 I. C. C. 545, 549, 564, 566, 612. A reference to the Commission's decisions in the above proceedings will indicate the full hearing which was given the fare problems in those cases. In the *Passenger Fares* case, the report of the Commission, 214 I. C. C. at 175, shows that all carriers by railroad subject to the act were made respondents and that a committee of the State Commissioners cooperated with the Commission in determining the issues. In the *Increased Railway Rates* case, all the states were notified of the pendency of the proceeding and a committee of the state commissions also attended the hearing and oral argument and conferred as to the determination of the issues. 248 I. C. C. at 549. All rail carriers were again before the Commission.

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[3] States made the earliest efforts to limit passenger fares. E. g. Kansas, 1901, § 66-167, Revised Statutes of Kansas (1923); North Dakota, 1907, § 4796, Compiled Laws of North Dakota (1913); Illinois, 1907, § 170, Callaghans Illinois Statutes Annotated (1924); Iowa, 1913, § 8126, Code of Iowa (1924). Such limitations were, of course, not uniform. On May 25, 1918, by General Order No. 28, the United States Railroad Administration in order to increase the operating revenue fixed the national basic passenger fare in coaches, interstate and intrastate, at not less than 3 cents per mile, with a surcharge for pullmans. This produced a considerable degree of uniformity. An increase of 20% or to 3.6 cents was made as of August 26, 1920. In the depression of the 1930s certain carriers operating in southern territory experimented with fair success on revenues with fares as low as 1.5 cents per mile in coaches. Alabama Intrastate Fares, 258 I. C. C. at 134.

Approximate uniformity before 1936 was maintained by the Commission's use of 13(4) orders to bring intrastate fares into line with interstate fares. The Commission found it more convenient later to secure state adoption of its rates by cooperation through agreement. See Sharfman, The Interstate Commerce Commission II, pp. 287-344.

After the ten per cent increase, the railroads of southern passenger association territory filed, on July 14, 1942, a petition in *Passenger Fares and Surcharges*, No. 26550, seeking a modification of paragraph 3 of the conclusions, 214 I. C. C. at 257, to enable them to file tariffs increasing their coach fare to 2.2 cents (2 cents plus 10 per cent). The Commission ruled that its former decision in No. 26550, 214 I. C. C. at 256, permitted all railroads, respondents therein, which included applicants, to charge a basic fare of 2 cents and that a general increase of 10 per cent on these rates had been authorized in *Ex parte No. 148*, and that therefore the Commission could and it did authorize the application of the 2.2 cent basic rate to interstate rates in southern territory. The Commission by order of August 1, 1942, directed that the petition in No. 26550 be denied, evidently because the order in that number had been superseded by the "Increased Rates" proceedings, *Ex parte No. 148*, and that its order in *Ex parte No. 148* be modified to effectuate this increase and that it be left otherwise unchanged.[4] The participating carriers then approached the separate state authorities to obtain their consent to the increase for intrastate passenger traffic in accordance with the recitation in the order of January 21, 1942, in *Ex parte No. 148*.[5] On the refusal of the rate regulatory authorities of North Carolina, Alabama, Tennessee and Kentucky to authorize the application of the increased interstate basic coach fare of 2.2 cents, with corresponding adjustments for pullmans, to all intrastate fares, this present proceeding was initiated by the carriers to secure the Commission order of May 8, 1944, here involved, which requires the application of a basis no lower than their present interstate basis to intrastate fares, notwithstanding the refusal of the state

[4] "*It is further ordered*, That the order of January 21, 1942, in Ex Parte No. 148 be, and it is hereby, further modified so as to authorize the aforesaid petitioners to apply the increase of 10 percent approved in said order to a basic coach fare of 2 cents per mile on the lines of said petitioners, subject to the rule for the disposition of fractions as modified by order of July 6, 1942, in said proceeding, and that in all other respects said order of January 21, 1942, shall remain in full force and effect."

[5] The portion of the order referred to reads as follows:

"*It appearing*, . . . that the proper authorities of all States have been notified of this proceeding, and similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares, and charges;

. . . . . .

"*It is ordered*, That the increased passenger fares as proposed by the said petitioners be, and they are hereby, approved, . . ."

rate authorities to authorize a similar application. The commissions of the respective states, and the Price Administrator for himself and the Director of Economic Administration intervened.

The foregoing references make plain that beginning with the comprehensive investigation on passenger fares, which was instituted by Commission order of June 4, 1934, and resulted in the order of February 28, 1936, 214 I. C. C. 174, the state regulatory authorities have not only been advised of the rate proceedings but have participated in them. The record specifically shows this participation except in the supplementary proceeding under docket No. 26550, which was filed July 14, 1942, and resulted in the order of August 1, 1942, in docket *Ex parte No. 148*. This August 1, 1942, order, note 4 *supra*, permitted increasing the carriers' interstate fares of 1.65 cents per passenger mile (the 1.50 cents of the 1936 experimental southern district fares, then adjudged by the Commission to be "not unreasonable or otherwise unlawful," 214 I. C. C. 257, par. 3, and the ten per cent increase thereon of *Ex parte No. 148*, 248 I. C. C. 545, 564-66) to 2.2 cents. There was no occasion or requirement for hearing or report by the Commission or notice to the states of the petition of the southern passenger association carriers for permission to apply this 2.2 cents basic passenger rate to their interstate traffic.

The southern railroad passenger rate problem was stated in the terms of "what reasonable fare basis will meet with the greatest revenue response from the public?" 214 I. C. C. at 201. The conclusion of the Commission is thus summarized at page 255, finding of fact No. 11:

"Giving appropriate consideration to all of the evident circumstances and conditions which are likely to affect the ultimate revenue result to respondents, a maximum-fare basis, one way and round trip, for general application, of 2 cents per mile in coaches and 3 cents per mile in pullmans would be most likely to lessen the transportation burden of respondents and to harmonize with present-day economic conditions, with consequent fuller assurance to the respondents of realizing a fair return upon their property investment. There is doubt whether at least in the southern district a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any higher fare, and it may also be that round-trip fares on both coach and pullman traffic at a lower rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results than the higher fares. These matters are left to the discretion of respondents."

This resulted in the following provision by the Commission, at page 257:

"3. The present experimental fares in the southern and western districts and on the Norfolk & Western are not unreasonable or otherwise unlawful."

Obviously this provision was to make clear that the current lower rates of the southern carriers were not disapproved. It cannot properly be read, even though entirely isolated from its context as a requirement that the southern carriers should continue to apply this lower basis to their passenger fares. The preceding provision limited the regular passenger fare structure of all railroads, including of course the southern carriers now appellees, to a maximum of 2 cents per passenger mile in coaches, without prejudice to lower fares. Lower fares were "discretionary" with the company. The accompanying order limited maximum interstate fares generally to 2 cents and contained no reference to the lower experimental fares. Thus a national interstate basis schedule, universally applicable[6] was established by the report and order in docket No. 26550, the *Passenger Fares and Surcharges* decision, and this basis was increased to 2.2 cents per mile by the January 21, 1942, order in *Ex parte No. 148*, 248 I. C. C. 545. Consequently when the southern carriers, appellees here, petitioned on July 14, 1942, seeking a modification to permit the publication of interstate passenger tariffs in conformity with the previous conclusions in No. 26550 and *Ex parte No. 148*, no further investigation, report or notice to anyone was needed.

The interstate basis had been fixed at 2.2 cents a few months before. Carriers and states alike had acquiesced. The carriers now wished to exercise the discretion to raise fares, which discretion had been reserved to them in No. 26550, 214 I. C. C. at 255, and subsequent conclusions 2 and 3, at 256. All that was necessary was to modify the order in *Ex parte No. 148* of January 21, 1942, which had approved, "as proposed", a requested ten per cent increase in fares "as published in passenger tariffs," 248 I. C. C. 550, 565, and the order, note 5 *supra*, so that the limitation "as published in passenger tariffs" would be removed. The appellee carriers had outstanding published tariffs of 1.50 cents when the January 21, 1942, order was entered. The August 1, 1942 order removed the limitation. See note 4 *supra*.

[6] There were certain specified exceptions. 214 I. C. C. at 244.

The preceding paragraphs under "Basic Interstate Fares" demonstrate, we think, that no further hearings or findings by the Commission were necessary to enable the Commission to authorize the application of the national basis of 2.2 cents to their interstate fares by the appellee carriers, instead of the 1.65 cents in effect prior to the order of August 1, 1942.

Discrimination Against Interstate Commerce. The Court holds, however, that even if it is assumed that the order permitting the interstate basic fare of 2.2 cents is valid, it does not follow that the intrastate passenger traffic earnings on the 1.65 cent rate are not contributing a fair proportion of the required total earnings of the road. The Court points to evidence from which the Commission might have found that the 1.65 cent basis, or a lower basis than 2.2 cents, would produce sufficient to meet the intrastate contribution. Evidence is set out in the Court's opinion showing greatly increased passenger earnings. The Court concludes that as such evidence is presented in this record, the Commission must make finding that no lower fare will produce intrastate traffic's proportion of revenue before requiring the application of the interstate 2.2 cent rate to intrastate fares.

This argument, we think, flows from another phase of the same misconception to which we earlier referred as the source of the Court's erroneous conclusion. These proceedings ought not to be treated as isolated efforts to secure higher intrastate rates because the present intrastate rates are not producing their fair share of the total required income. To the Court's requirement, which it reads into Sections 13(4) and 15a, of a specific finding on the issue of whether the present 1.65 cent intrastate rate produces now the proper intrastate proportion of revenue, there seems to us a conclusive answer. The interstate maximum was adopted by the Commission on the assumption that the intrastate rates would be adjusted to the same level. Therefore revenue from intrastate rates at the interstate fares is required to produce the needed income.

In this present proceeding the validity of the interstate rate of these carrier appellees was re-examined.[7] Evidence as to each

[7] The national investigation, Ex parte No. 148, has also been reopened and reexamined at late as December 12, 1944, but the passenger rates were left unchanged. 259 I. C. C. 159. This report discussed intermediate reexaminations of the national passenger rate structure.

appellee carrier of former deficits from its entire passenger traffic prior to 1942 was noted. Evidence as to their passenger operating ratios, their increased expenses, their net earnings on passenger business and other operations also, was received and appraised. Attention was called, 258 I. C. C. 142, to the fact that the previous investigation into passenger rates, *Ex parte No. 148*, had anticipated the earnings during war years, page 142, and their need for deferred maintenance and war service, page 148. The interstate basic rate was found just and reasonable. See *Alabama Intrastate Fares*, 258 I. C. C. 133, 137.

The figures used were aggregate figures for past passenger receipts and expenses. Audits for representative periods showed the estimated amount of additional revenue from the increased intrastate fares.[8] The statistics for the net railway operating income were introduced which covered all receipts and expenses. The evidence of train service in the respective states led the Commission to find that travel conditions were "substantially similar," 258 I. C. C. 154. If the Commission's conclusion as to carrier revenue needs assumed equal intrastate and interstate fares and if the present interstate rates were held "just and reasonable," it follows that the finding that the lower intrastate rates were not contributing their fair share of the "revenues required to enable respondents to render adequate and efficient transportation service" was proper. This logically led to the finding 6, that this failure of intrastate traffic to contribute its part discriminated against interstate commerce.

The determination of the necessary basic interstate rate in all these proceedings was made on the supposition of intrastate rates of equal level. When general basic rates, fares or charges are fixed by the Commission, the Commission necessarily gives consideration "to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide" railway transportation at the lowest cost. Section 15a. Therefore when interstate rates are fixed with the supposition of an equal level for intrastate rates, for substantially similar service, it requires a

[8] Alabama Intrastate Fares, 258 I. C. C. 133, 154-55, Finding 5:

"Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service."

contribution on that basis from intrastate rates to avoid intrastate discrimination against interstate traffic. If it appears that interstate fares have been fixed with the supposition of an equal level for intrastate fares, then it is clear that intrastate rates are not producing their expected revenue. The Commission thus would have manifested its consideration of the statutory requirements of Section 13(4) and 15a that due consideration be given revenue and efficient management in finding unjust discrimination against interstate commerce and in prescribing the intrastate rate which would remove the discrimination. See *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.

In the proceeding in which these southern interstate carriers were permitted to apply the general basic interstate coach rate of 2.2 cents, the order therein of August 1, 1942, by adopting the order of January 21, 1942, in *Ex parte No. 148*, 248 I. C. C. 545, required the appellee carriers to make application to the state authorities for similar intrastate increases. See note 5, *supra*. The required applications led directly to this litigation.

Both in *Passenger Fares and Surcharges*, 214 I. C. C. 174, 257, par. 5, and *Increased Railway Rates, Ex parte No. 148*, 248 I. C. C. 545, 565-66, which are the two investigations which brought interstate coach fares to a maximum of 2.2 cents per passenger mile, the Commission itself ordered the numerous intrastate fares which were under its direction because regulated by the Commission through previous Section 13 proceedings, modified in accordance with the interstate fares. As pointed out in the preceding paragraph the order in *Ex parte No. 148* required application to state rate regulatory bodies for authority to increase the intrastate passenger rates to the same level. Specific consideration was given to various objections raised by state commissions to the proposed new fares and rates, all with an eye to securing future compliance by the states with the interstate rates to be set by the Commission. See 248 I. C. C. at 560, 565, 574, 580, 582. In the *Passenger Fares* investigation, the figures of passenger traffic reflect the aggregate use of trains without consideration of a division of the traffic between inter- and intrastate. 214 I. C. C. 174, 176, 179, 180, 185, 200, 209, 221, 230, 231. The Commission said at page 187:

"At the time the 1920 increase was authorized many of the States prohibited passenger fares above certain amounts per mile, most

of them 2 cents or 2.5 cents, and section 13 orders by us became necessary in order to bring the intrastate fares in those States up to the interstate basis."

The tables of passenger statistics in the appendices do not separate the traffic. Revenue from all passenger traffic was the dominant motive. See "Fact Findings," page 253. Evidence in *Ex parte No. 148* likewise related to aggregate revenue. So did the expected increases.

"On the basis of traffic, both interstate and intrastate, moved during 1941 and moving when the petition was filed, allowing for readjustments required by commercial and traffic conditions, petitioners estimate that the proposals will yield increased revenue for all class I railroads of about $356,956,000 per year." 248 I. C. C. 552.

The interstate increase of *Ex parte No. 148* "became effective on intrastate traffic in all of the States" by state order. 258 I. C. C. at 136. The general considerations on the decline in railroad passenger traffic which motivated the Commission in establishing the new interstate rate applied to both intrastate and interstate traffic. 214 I. C. C. at 176; 248 I. C. C. at 551. As a matter of fact, separation of interstate and intrastate income is not required by the Commission in its annual reports. 49 C. F. R. § 120.11. *et seq.* These proceedings convince us that the Commission reached its conclusion as to the proper interstate rate with the understanding that the interstate rate would be applied to intrastate traffic and that such revenue as might result from that application were needed by the carriers involved to furnish adequate service.

Under Section 13(4) of the Interstate Commerce Act in proceedings as to unjust discrimination against interstate commerce, the issue is not the earnings from intrastate traffic but the appropriate proportion of those earnings as compared with earnings from interstate commerce. Section 15a requires consideration of costs, economy and adequate transportation service. Section 13(4) requires a finding of discrimination against interstate commerce as a basis for regulation of intrastate commerce, 258 I. C. C. 154-55, pars. 5 and 6. It may be that the earnings from intrastate commerce may sometimes be one percentage of aggregate earnings and at another time another percentage. The Commission may conclude that the carriers' required revenue may best be obtained from intrastate passenger fares rather

than from freight rates. The reverse was once true. Cf. 214 I. C. C. at 227. These are matters for Commission decision.

The language of 15a has been modified from its original form in the Transportation Act of 1920 so that it no longer specifically empowers the Commission to deal with fares and rates of carriers as a whole for the nation or as a whole in designated territories or rate groups. We think, however, that the present statute, "In the exercise of its power to prescribe just and reasonable rates," the Commission shall give consideration to various named factors, is adequate to permit general rate regulation under 15a and Section 1(5). This power has been unquestioned. See *Passenger Fares and Surcharges*, 214 I. C. C. 174, and Class Rate Investigation No. 28300 and Consolidated Freight Classification No. 28310. It is the only practicable approach to the problem. See discussion in *New England Divisions Case*, 261 U. S. 184, 196. We cannot treat the present proceeding as disassociated from the general investigation into passenger fares. *United States* v. *Louisiana*, 290 U. S. 70, 76-79. We think it is adequately shown that the orders in the general investigation were predicated upon the assumption that intrastate passenger traffic would have an equal basis with interstate traffic for fares.

Unjust or Unreasonable Intrastate Fares. It may be that the intrastate fares prescribed by the Commission are unjust or unreasonable in certain items. The report of the Commission provides a remedy for such a situation:

"The foregoing findings are without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act." 258 I. C. C. at p. 155.

The remedy for a readjustment of the basic interstate fare or for a separation of the levels of interstate and intrastate fares is by application to the Commission for reopening of *Passenger Fares and Surcharges*, 214 I. C. C. 174.

We do not consider the other points which are raised by the appeal.

The CHIEF JUSTICE, Mr. Justice ROBERTS and Mr. Justice FRANKFURTER join in this dissent.